

Internal Revenue Service

memorandum

CC:TL:Brl

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date: FEB 14 1986

to: District Counsel, Phoenix CC:SW:PNX
Attn: David Otto

from: Acting Director, Tax Litigation Division CC:TL

subject: [REDACTED]

This is in response to your request for technical advice.

I. Issue

Is the FPAA procedure of §6223 the sole method of determining deficiencies for TEFRA partnership adjustments to a participating partner or may the statutory notice of deficiency procedure of §6212 be utilized? (RIRA No. 9999.99-00)

II. Conclusion

The FPAA procedure of §6223 is the sole method of determining deficiencies for TEFRA partnership adjustments to a participating partner. The statutory notice which was issued to the [REDACTED] is invalid both with regard to the partnership loss and the penalties and additional interest. It is our position that penalties and additional interest are not non-partnership items but rather are "affected items" and, therefore, they may not be included in the statutory notice.

III. Facts

[REDACTED] is one of a series of tax shelter partnerships known as [REDACTED]. The [REDACTED] partnerships have elected to be treated under TEFRA provisions with respect to the [REDACTED] taxable year. See Barbados #6 Ltd., et al. v. Commissioner, 85 T.C. [REDACTED], No. 53 slip op. at 4, fn. 4 (December 10, 1985). [REDACTED]'s TEFRA partnership examination is currently in process and is being handled by a revenue agent in [REDACTED], California. A notice under §6223(a)(1) regarding the beginning of an administrative proceeding at the partnership level with respect to partnership items has been issued to the Tax Matters Partner for each of the [REDACTED] partnerships.

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Subsequent to the notice issued pursuant to §6223(a)(1), on [REDACTED], a statutory notice of deficiency was issued to taxpayers, [REDACTED] in which the sole income tax adjustment was a disallowance of the claimed losses from [REDACTED] for the taxable year [REDACTED]. In addition, the statutory notice asserted penalties under sections 6653(a) and 6661 as well as additional interest pursuant to section 6621(d).

On [REDACTED], taxpayers timely filed a petition with the U.S. Tax Court. Petitioners allege that the proceedings at the partner level are improper in light of section 6225, which in essence provides for injunctive relief where assessment and collection action is premature.

IV. Discussion

Prior to the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), determining the tax liability of partners was problematic due to the fragmented nature of such determinations. Duplication of manpower and administrative and judicial effort was required in some cases to determine aggregate tax liability attributable to a single partnership item, and inconsistent results were sometimes obtained for different partners with respect to the same item. Where formerly separate proceedings with each partner were required, now pursuant to TEFRA, the tax treatment of partnership items is determined at the partnership level in a unified partnership proceeding. As discussed, *infra*, provisions in the statute for the unified partnership proceeding include notice, participation, judicial review and assessments.

A. Overview of Relevant Portions of the Statute

The Tax Matters Partner (TMP) is the general partner so designated pursuant to regulations or, in the absence of such designation, the partner with the largest profits interest in the partnership at the end of the year involved. Otherwise, the TMP will be selected by the Secretary. Pursuant to section 6223(a)(1), each partner whose name and address is furnished to the Secretary shall receive notice of the beginning of an administrative proceeding at the partnership level (audit) with respect to partnership items and pursuant to section 6223(a)(2) shall receive notice of the final partnership administrative adjustment (FPAA), provided, however, that sufficient information is furnished to the Secretary at least 30 days before any such notice is mailed to the TMP, to enable the Secretary to determine that the partner is entitled to the notice. §6223(a). Accordingly, pursuant to §6224(a), any partner has the right to participate in any administrative proceeding relating to the determination of partnership items at the partnership level.

Section 6226 provides for judicial review of the FPAA. The TMP, within 90 days after the mailing of the notice of FPAA, may file a petition for readjustment of partnership items in the Tax Court, the appropriate district court or the Claims Court. During such 90 day period, no other partner may file a petition for judicial review. If the TMP does not file a petition, any notice partner or 5 percent group with an interest in the outcome, see §§6223(a) and (b)(2), may, within 60 days following such 90 day period, file a petition with any of the courts in which the TMP may file a petition. Only one proceeding may go forward, and the first action filed in the Tax Court will establish jurisdiction or, if no petition is filed with the Tax Court, the first action filed in either of the other courts will go forward. Other actions will be dismissed. The TMP may intervene in an action brought by another partner. Each partner with an interest in the outcome shall be treated as a party to the action and will be allowed by the court to participate in the action. §6226(c).

Pursuant to section 6225, assessments may be made only after partnership level proceedings are completed. Specifically, any deficiency resulting from an administrative determination may not be assessed until 150 days after mailing the notice of FPAA to the TMP, or if within the 150 day period a Tax Court proceeding is commenced, until the decision in such proceeding has become final. Any action to assess or collect the tax in violation of this restriction may be enjoined in the proper court. Furthermore, section 6230(a) specifically provides that Subchapter B (normal deficiency proceedings) do not apply to any change in the tax liability of a partner as a result of the TEFRA partnership proceeding.

B. The [REDACTED] Statutory Notice Regarding Partnership Loss

[REDACTED] is a partnership which for taxable year [REDACTED] will have its tax treatment determined at the partnership level pursuant to I.R.C. §§6221 through 6233 (a TEFRA partnership). A notice of the beginning of an administrative proceeding at the partnership level was issued to the TMP by Respondent under §6223(a)(1), prior to the mailing of the statutory notice to the taxpayers, the [REDACTED]. A notice of FPAA under §6223(a)(2) has not been issued yet regarding this partnership examination. As noted, §6230(a) specifically precludes normal deficiency proceedings with reference to TEFRA partnership proceedings. In addition, there are no proper non-partnership items in the statutory notice.

Therefore, the statutory notice is invalid in its entirety because it attempts to determine a deficiency for TEFRA partnership items other than through procedures prescribed by §§6221-6233. It is our opinion that the Tax Court lacks jurisdiction because the statutory notice is invalid. Fuller v. Commissioner, Dkt. No. 5722-85 (Memorandum Sur Order, December 11, 1985, Cantrel, S.T.J.).

C. The [REDACTED] Statutory Notice Regarding Penalties and Additional Interest

An administrative proceeding regarding [REDACTED] is still in process. Until a final determination is made regarding the partnership items, it would obviously be premature to allege penalties or additional interest with regard to such items in a statutory notice, and the Tax Court would not have jurisdiction over related penalties or additional interest absent jurisdiction over the partnership items. Furthermore, pursuant to the definition of partnership item found at §6231(a)(3), it would seem that the FPAA cannot include penalties or additional interest because such items are not in subtitle A. Our position, though, is that they are "affected items" and should not be separately alleged in a §6212 statutory notice. On the contrary, the penalties and additional interest should be asserted as a computational adjustment after the conclusion of the partnership proceeding.

V. Recommendation

We recommend that the parties enter into a joint stipulation and a joint motion to dismiss for lack of jurisdiction. The motion should state that no valid statutory notice of deficiency under I.R.C. §6212 was issued to petitioners in this case and the notice issued on [REDACTED] is invalid and prohibited by I.R.C. §6230. The stipulation should include the facts that the items on the statutory notice are either partnership items or affected items; the parties agree that the [REDACTED] statutory notice is invalid in its entirety insofar as it attempts to determine a deficiency for TEFRA partnership and affected items other than through the procedures prescribed by §§6221 through 6233; and the Joint Motion to Dismiss for Lack of Jurisdiction is without prejudice to the Respondent to proceed under I.R.C. §§6221 through 6233 to deal with [REDACTED] as appropriate, including the issuance of a final partnership administrative adjustment under I.R.C. §6223(a)(2) should such action be appropriate and timely.

We note that if there had been non-TEFRA partnership items in the statutory notice, the entire notice would not be invalid and any stipulation would need to indicate the validity of the notice for such non-TEFRA partnership items. A Joint Motion to Dismiss for Lack of Jurisdiction and to Strike would have been necessary and would have referenced only that portion of the adjustments and pleadings pertaining to [REDACTED] 43. Such actions would preserve the validity of the statutory notice with respect to the non-TEFRA partnership items.

MARLENE P. GROSS
Acting Director

By: Dan Henry Lee
DAN HENRY LEE
Chief, Branch No. 1
Tax Litigation Division